No. 91-122

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

# BRIEF OF THE STATES OF MARYLAND, FLORIDA AND MAINE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Does an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law give rise to a substantive due process claim under 42 U.S.C. § 1983?

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SUPPORT OF RESPONDENTS

Pursuant to S.Ct.R. 37, the States of Maryland, Florida and Maine respectfully submit this brief as amici curiae in support of Respondents.

## INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

This case involves important questions concerning individual rights, judicial power, and the ability of state and local governments to exercise their traditional regulatory functions unhindered by federal court interference. The issue of whether a disappointed applicant for a construction permit may seek review of the decision directly in federal court, simply by alleging that the denial was arbitrary and capricious, is of major importance to the States because virtually every State regulates zoning and construction activities.[1] Each such State

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[1] In Maryland, for example, local governments administer planning and zoning requirements. See, e.g., Md. Ann. Code, art. 66B, §§3.01-4.08 (noncharter counties and municipalities); Md. Ann. Code, art. 25A, §5(x) (Home Rule charter counties); Md. Ann. Code, art. 28 §§7-101 to 111, 8-101 to 104 (Maryland-Washington regional district). Depending on the location, developers may also need other permits from the State. See, e.g., Md. Nat. Res. Code Ann., §§8-1801-1816 (cont.)



already provides a mechanism for the review of land use decisions, generally under a state administrative procedure act, which enables the applicant to appeal decisions that allegedly are "arbitrary or capricious." For example, the Maryland Administrative Procedure Act, which like those of most other States is patterned after the Model State Administrative Procedure Act, provides for judicial review of the "grant, denial, renewal, revocation, suspension or amendment" of any license, approval, certificate, charter, permit or registration required by law to be determined after an opportunity for a hearing. Md. State Gov't Code Ann., §§10-201 to 215. A party

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(Chesapeake Bay Critical Area Protection Program); Md. Nat. Res. Code Ann., §§9-101 to 502 (Maryland Wetlands Act). Additional State and local permits also are required for certain activities attendant to construction, such as sediment control and installation of water and sewage systems. See Md. Envt'l. Code Ann., §§4-101 to 109.

aggrieved by a final decision is entitled to reversal if that party can show that the decision is unconstitutional, exceeds the authority of the agency, results from unlawful procedure or error of law, is not supported by substantial evidence or "is arbitrary or capricious." Id. at §10-215(g).

Thus, the States uniformly provide for judicial review of decisions adjudicating rights and interests accorded under state laws. There is no reason to create an additional federal forum for appealing these unexceptional decisions under the Due Process Clause.

Simply put, the Due Process Clause of the Fourteenth Amendment does not authorize the federal courts to inject themselves into land use disputes and other routine matters of purely state and local concern that involve, as this case does, allegedly arbitrary or capricious decision making.



Particularly where there is no showing that state review procedures are inadequate to correct any genuinely arbitrary or capricious state actions, this Court should not adopt a broad interpretation of the Fourteenth Amendment that substantially alters the basic relationship between the States and the federal government.

## ARGUMENT

### A. THE ARBITRARY, CAPRICIOUS OR ILLEGAL DENIAL OF A BUILDING PERMIT GIVES RISE TO NO SUBSTANTIVE DUE PROCESS VIOLATION.

The Due Process Clause was not meant to convert the federal courts into super zoning authorities, just as "it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Daniels v. Williams, 474 U.S. 327, 332 (1986).[2] Profound considerations of

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2 See, e.g., Scudder v. Town of Greendale, 704 F.2d 999, 1003 (7th Cir. 1983) ("Were we (cont.)

federalism counsel against an interpretation of the Constitution that would promote needless federal-state friction in areas of significant state and local concern. Cf. Bishop v. Wood, 426 U.S. 341, 349 (1976) ("federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies"); Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 (1985) (federal court not the appropriate forum in which to review "the substance of the multitude of academic decisions that are made by faculty members at public educational institutions").

The Due Process Clause of the Fourteenth

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to accept the plaintiff's argument that a mere denial of an application for a building permit, in a fact situation such as this, per se constitutes a violation of the federal Constitution, virtually every routine denial of the building permit would become a potential federal case. . . . '[I]t is not the function of federal district courts to serve as zoning appeals boards.'") (quotation omitted).



Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[3] In addition to embracing a procedural component that guarantees that government action must be implemented in a fair manner, see, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976), "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them." Zinermon v. Burch, 110 S.Ct. 975, 983 (1990), quoting Daniels v. Williams, 474 U.S. 327 (1986).

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3 This Court long ago found that the words "due process of law" "conveyed 'the same meaning as the words 'by the law of the land,' in Magna Carta' " and impose " 'a restraint on the legislature as well as on the executive and judicial powers of the government.' " Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 1049 (1991) (Scalia, J., concurring), quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276 (1856).

Substantive due process is not, however, a catch-all for review of any state action that is capable of being described as arbitrary or capricious; instead, its scope is far narrower, reaching only to prevent "the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " United States v. Salerno, 481 U.S. 739, 746 (1987), quoting Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

This Court has interpreted the Due Process Clause "to secure the individual from the arbitrary exercise of the powers of government," Hurtado v. California, 110 U.S. 516, 527 (1884) (quotations omitted), in areas involving fundamental rights and liberties. See Bowers v. Hardwick, 478 U.S. 186 (1986) (fundamental rights related to family, marriage and procreation held not to



extend to homosexual activity); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) ("the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection").[4]

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[4] Although the Due Process Clause was at one time interpreted to invalidate state economic legislation, see, e.g., Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 617-18 (1936); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897), that interpretation was abandoned in the late 1930's, see West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-400 (1937), and has since been expressly repudiated. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525, 536-37 (1949). Indeed, in recent years this Court has recognized substantive due process rights only in cases dealing with liberty interests rather than property or other economic regulation. See, e.g., Rochin v. California, 342 U.S. 165 (stomach pumping of suspect for drugs invalidated); Griswold v. Connecticut, 381 U.S. 479 (1965) (regulation of use of contraceptives by married couples held to be unlawful); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation law because of its interference with freedom to marry); Roe v. Wade, 410 U.S. 113 (1973) (right of privacy extended to include right to terminate a pregnancy).

Substantive due process also extends to deliberate rather than careless government action, see Daniels v. Williams, 474 U.S. 327, encompassing conduct that imposes "unjustified intrusions on personal security," Ingraham v. Wright, 430 U.S. 651, 673 (1977) (footnote omitted), through "methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. California, 342 U.S. at 172.

However, over a century ago this Court rejected the view that the Due Process Clause could be used "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant . . . of the justice of the decision against him. . . ." Davidson v. New Orleans, 96 U.S. 97, 104 (1878). Yet Petitioner advances the same discredited interpretation of the Fourteenth Amendment in asking this Court to clothe its permit grievance in



constitutional garb, as "[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." App. Pet. Cert. 8a (quotations omitted).

The Due Process Clause does not impose any " 'constitutional obligation on government to behave 'reasonably' or to avoid 'arbitrary' action. . . . 'Arbitrary' and 'capricious' are not constitutional terms.'" Myers, The End of Substantive Due Process?, 45 Wash. & Lee L. Rev. 557. 617 (1988), quoting Linde, Without 'Due Process,' 49 Or. L. Rev. 125, 167 (1970). Cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (absent independent constitutional duty, mere

allegation that child was harmed due to governmental conduct that "shocks the conscience" does not state a claim for violation of substantive due process). There is, in fact, "no express constitutional language granting judicial power to invalidate every state law [or action] of every kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies." Rochin v. California, 342 U.S. at 176 (Black, J., concurring) (emphases omitted).

Given the absence of constitutional language to guide and limit an interpretation of the Due Process Clause, "[s]ubstantive due process has at times been a treacherous field for this Court," Moore v. East Cleveland, 431 U.S. 494, 502 (1977), as evidenced by the history of the state economic regulation cases which resulted in a broad "repudiation of much of the substantive gloss that the



Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expanding the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. at 194-95.

This case is simply not an appropriate vehicle for the Court "to discover new fundamental rights imbedded in the Due Process Clause." Bowers, 478 U.S. at 195. Petitioner's interest in a construction permit derives exclusively from land use procedures established by Puerto Rico law. That interest "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." Regents of the University of Michigan v. Ewing, 474 U.S. at 229-30 (Powell, J., concurring).

Nothing in this Court's jurisprudence remotely suggests that this case involves any of the rights or liberties or government action that have in the past triggered the protections of substantive due process. As the court of appeals below noted, Petitioner "alleges no facts that would suggest discrimination based on an invidious classification such as race or sex," App. Pet. Cert. 8a, and this case raises no claim that "the project approval procedures established by Puerto Rico law and by [Respondent] ARPE's custom and practice violate the Due Process Clause of the federal Constitution." App. Pet. Cert. 5a. Similarly, Petitioner alleges no unfairness or "arbitrary" or "capricious" behavior by either the Superior Court of Puerto Rico, which affirmed the denial of Petitioner's building permit, App. Pet. Cert. 3a, or the Supreme Court of Puerto Rico, which denied



review of Petitioner's appeal. Id. There is no substantive due process right to be free of the government action complained of here.

To the extent Petitioner alleges a denial of property, his claim should be analyzed under the Just Compensation Clause. See generally First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).[5] To the extent Petitioner's claim is that the Commonwealth arbitrarily or capriciously singled him out in applying local law, then that claim should be analyzed under the Equal Protection Clause of the Fourteenth Amendment. See generally

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5 Petitioner initially raised but then abandoned such a taking claim in the district court. App. Pet. Cert. 4a. The Court of Appeals for the First Circuit appropriately expressed doubts about whether "PFZ's expectation of receiving a construction permit from ARPE constituted a property interest . . . ." PFZ Properties, Inc. v. Rodriquez, 928 F.2d 28, 30-31 (1st Cir. 1991). Absent a property interest, of course, there could have been no claim of a taking.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (denial of special use permit for operation of group home for the mentally retarded violated the Equal Protection Clause). But because those "Amendment[s] provide[] an explicit textual source of constitutional protection against this sort of intrusive governmental conduct, th[ose] Amendment[s], not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v. Connor, 109 S.Ct. 1865, 1871 (1989) (footnote omitted).[6]

Petitioner's claim might be reviewable under these more specific constitutional

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6 See also Whitley v. Albers, 475 U.S. 312, 327 (1986) ("Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty . . . the Due Process Clause affords no greater protection than does the Cruel and Unusual Punishments Clause."); Daniels v. Williams, 474 U.S. at 340 n. 16 (Stevens, J., concurring).



provisions. This case presents no justification, however, for this Court to adopt Petitioner's sweeping and unprecedented interpretation of the Due Process Clause.

**B. PETITIONER CANNOT STATE A CLAIM BASED ON SUBSTANTIVE DUE PROCESS ABSENT A SHOWING THAT STATE JUDICIAL PROCEEDINGS WERE ARBITRARY AND CAPRICIOUS.**

Even if the Court were to recognize a due process right to be free of arbitrary or capricious government action in the area of construction permits, this Court should condition federal court intervention on adequate allegations that the totality of state action caused constitutional injury. Absent a threshold showing that the state courts acted in an arbitrary or capricious manner in conducting their review of the agency decision, a disappointed permit applicant cannot be deprived of "life, liberty, or property, without due process of law."

This Court in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), held that a claim that the State unconstitutionally exercised its regulatory powers in the zoning context was not ripe for review until the claimant availed itself of the procedures provided by the State for obtaining just compensation, regardless of whether the property owner's claim "is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." Williamson, 473 U.S. at 200 (footnote omitted). Early due process decisions of this Court, moreover, show that "[t]here is nothing of an arbitrary character," if, should there "be any unfair or unjust action on the part of the board . . .[,] a remedy would be found in the courts of the state." Dent v. West Virginia, 129 U.S.



114, 124-25 (1889).[7]

Here, Puerto Rico law authorized the Superior Court of Puerto Rico to review the precise arbitrary, capricious and illegal conduct that Petitioner challenges. App. Pet. Cert. 5a; 18a; quoting 23 L.P.R.A. § 72. Petitioner utilized that judicial remedy but made no showing that the Puerto Rico courts denied him fair and adequate review of his claim. There can be no substantive due process violation, therefore, because "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post deprivation remedy for the property loss,'" Williamson, 473 U.S. at 195, quoting

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[7] See also Davidson v. New Orleans, 96 U.S. 97, 105-06 (1878) ("[T]he party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.").

Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984), and that remedy was both provided and adequate here.

To accommodate the State interest in local land use decisions in the context of Petitioner's application for a construction permit, and the countervailing federal interest in safeguarding against "arbitrary or capricious" deprivations of fundamental rights, the federal courts should not be involved unless the applicant could show that the judicial review process in the State courts itself also was arbitrary or capricious in a constitutional sense, that is, that the state agency and courts engaged in deliberate and unjustified action affecting fundamental rights through conduct that shocks the conscience.[8] It is not

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[8] This approach would no more run afoul of the principle that exhaustion of review procedures is not required, see Patsy v. Florida Board of Regents, 457 U.S. 496 (cont.)



enough to allege that the state court decisions are arbitrary or capricious merely because they rejected a party's argument.

Absent this heightened showing, federal courts would become alternative fora for appeals of administrative decisions in areas affecting important state interests. Petitioner "would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 114 (1981). In addition, the very maintenance of the suit would intrude on the enforcement of the state scheme. State officials could be summoned to federal court to defend their actions merely on the assertion that the decision was arbitrary or

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(1982), than does the Court's approach in the Just Compensation arena. See Williamson, 473 U.S. at 193. The issue here is whether the Petitioner is able to allege that the State's final decision inflicts an actual, concrete constitutional injury, not whether all procedures for review have been exhausted.

capricious. Allowance of such claims would result in this Court being a source of appellate review of all state decisions. Id. Principles of federalism and comity preclude such disruptive interference with historic state interests.

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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